WANA GOLD & ANOR v. QALAM GOLD JEWELLERY (M) SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ONG CHEE KWAN J
[SUIT NO: WA-22NCC-914-12-2023]
23 JULY 2025

Abstract – *A party who has suffered a genuine wrong cannot choose to vent their grievance against an innocent party caught in the crossfire. Liability must be grounded in fault or responsibility, not emotion or misplaced retribution or self-help. Where wrong has been done, redress must follow but it must be sought from the right quarters and in accordance with the law. An innocent party, who does not even have a contractual relationship with the aggrieved party, but is threatened and its premises trespassed due to misdirection of blame, is entitled to exemplary damages.*

CONTRACT: *Agreement – Sale and purchase agreement ('SPA') – Purchase of gold between defendants and distributor company – Whether there was contractual relationship between plaintiffs and defendants – Whether plaintiffs merely advanced gold to defendants for the opening of defendants' shop – Plaintiffs claimed for return of gold – Whether defendants threatened plaintiffs' wellbeing – Whether defendants entering plaintiffs' shop and taking gold from their safe wrongful – Whether resulted in loss to plaintiffs – Whether high-handed conduct of defendants could be condoned – Whether plaintiffs entitled to exemplary damages*

TORT: *Damages – Exemplary damages – Claim for – Dispute regarding purchase of gold – Physical assault and threats made against plaintiffs – Whether defendants threatened plaintiffs' wellbeing – Whether defendants entering plaintiffs' shop and taking gold from their safe wrongful – Whether resulted in loss to plaintiffs – Whether high-handed conduct of defendants could be condoned – Whether plaintiffs entitled to exemplary damages*

The second plaintiff ('Fathin') was the sole proprietor of the first plaintiff ('Wana Gold') trading in gold jewelleries and accessories at a shop ('Wana Gold premises'). The third defendant ('Dato' Rozi') was the sole proprietor of the second defendant, Qalam Gold Jewellery ('Qalam Gold'). The first defendant, Qalam Gold Jewellery (M) Sdn Bhd ('Qalam Gold SB') was a company wholly owned by Dato' Rozi. The defendants had intended to purchase a large amount of gold for the opening of their gold shop. Towards this end, a meeting was held where Fathin (PW1) and her husband, Amirul (PW2) ('Amirul') both representing Wana Gold attended together with one Safiah Khalid ('DW1'), Raja Mohd Norak Raja Kadir ('Raja') and Dato' Rozi representing the defendants. They were later joined by Rashdan (PW3) ('Rashdan') who represented one Zuhal Distributor Enterprise ('Zuhal

Distributor') and Harry Goldsmith ('10 January 2023 meeting'). Zuhal Distributor and Harry Goldsmith were owned by one Dato' Suhairi Nordin ('Dato' Suhairi'). An agreement was reached between the defendants and Zuhal Distributor where the defendants agreed to purchase five kilograms of gold at the price of RM1,235,000 ('gold SPA'). There was, however, a dispute as to whether the plaintiffs were involved in the gold SPA. The plaintiffs contended that they had merely introduced Rashdan of Zuhal Distributor to the defendants as the defendants were not prepared to purchase the five kilograms of gold from the plaintiffs at the prevailing market price. The defendants, however, contended that the plaintiffs were parties to the gold SPA and was accordingly obliged to perform the same together with Zuhal Distributor. Pursuant to the gold SPA, the defendants had duly transferred to Zuhal Distributor the entire sum of RM1,235,000. Subsequently, Rashdan, Fathin and Amirul had gone to Dato' Rozi's office and handed over about 2,513.58 grams of gold to the defendants. According to the plaintiffs, out of the 2,513.58 grams, 382.70 grams were in fact gold belonging to the plaintiffs ('382.70 grams of gold'). The plaintiffs claimed that Rashdan had approached them sometime on 16 January 2023 to advance to the defendants the 382.70 grams of gold because Zuhal Distributor was unable to make delivery of sufficient quantity of gold under the gold SPA at the time. The plaintiffs were informed that the defendants needed sufficient quantity of gold to be delivered for the opening of Qalam Gold business. With the intention to assist, the plaintiffs agreed to advance the 382.70 grams of gold and according to the plaintiffs, both Fathin and Amirul had attended personally at Dato' Rozi's office for the delivery on 16 January 2023 to inform the defendants of the arrangement. Returning to the events at the 16 January 2023 meeting, the defendants claimed that they had no knowledge that the 382.70 grams of gold was only an advance by the plaintiffs since the defendants were not privy to the conversation and/or agreement between the plaintiffs and Rashdan. To the defendants, the defendants had fully paid the RM1,235,000 and the 2,513.58 grams of gold that was given to the defendants at the 16 January 2023 meeting constituted part of the five kilograms of gold to be delivered pursuant to the gold SPA. Between the 16 January 2023 meeting to 16 February 2023, only a total of about 3.5 kilograms of gold were delivered to the defendants from Zuhal Distributor notwithstanding repeated promises made by Rashdan and Dato' Suhairi that the entire five kilograms of gold would be delivered. On 16 February 2023, a meeting was held at Wana Gold premises between Dato' Suhairi and Rashdan representing Zuhal Distributor and Dato' Rozi representing the defendants ('16 February 2023 meeting'). At that meeting, a further 1,067.38 grams of gold were delivered and Zuhal Distributor had agreed to refund to the defendants a sum of RM444,906 representing the value of 1,801.24 grams of gold comprising the balance 1,419.67 grams due from Zuhal Distributor to the defendants under the gold SPA and the 382.70 grams of gold belonging to Wana Gold ('refund sum'). Unfortunately, no refunds were made by Zuhal Distributor after the 16 February 2023 meeting.

On 24 February 2023, the defendants organised a group of people to go to Rashdan's office at Kota Damansara to demand the refund sum. Notwithstanding that Rashdan had furnished them with Dato' Suhairi's residential address, they refused to go to Dato' Suhairi and instead insisted on fetching Rashdan to Wana Gold premises. Both Amirul and Fathin then met up with the defendants at the wedding hall in the mall ('wedding hall meeting'). Rashdan claimed that he was physically assaulted at that time while both Fathin and Amirul testified that they were threatened with harm by the defendants to hand over their gold in the Wana Gold premises towards the satisfaction of the balance undelivered gold under the gold SPA. Video recordings produced and played in court showed Fathin and Amirul allowing a group of men entering into the premises and Fathin opening a safe. The gold that were kept in the safe were taken out, weighed and subsequently some 224.70 grams of gold were taken away by the defendants ('224.70 grams of gold'). The plaintiffs in this action claimed against the defendants for, *inter alia*, (i) the return of the 382.70 grams of gold and the 224.70 grams of gold or their equivalent value in Ringgit Malaysia; and (ii) general, aggravated and exemplary damages. In their defence, the defendants contended that the plaintiffs were in joint venture or in partnership with Zuhal Distributor and therefore, the plaintiffs were obliged to ensure the performance of the gold SPA. The issues that arose for determination were (i) whether there was a contractual relationship between the plaintiffs and the defendants in respect of the gold SPA; (ii) whether the 382.70 grams of gold belonging to the plaintiff that were delivered to the defendants at the 16 January 2023 meeting formed part of the gold purchased by the defendants from Zuhal Distributor. Connected to this issue was whether the defendants were informed that the 382.70 grams of gold actually belonged to the plaintiffs and had to be returned to the plaintiffs; (iii) whether the defendants had wrongfully converted the 224.70 grams of gold from the plaintiffs on 24 February 2023; and (iv) whether the plaintiffs was entitled to any general damages and/or aggravated and exemplary damages.

Held (ordering accordingly):

(1a) The testimony of Fathin, that at the 10 January 2023 meeting, the defendants had agreed to purchase five kilograms of gold from Rashdan who was acting as the agent of Zuhal Distributor, was corroborated by documentary evidence which simply did not show the plaintiffs' involvement at all in the gold SPA. More specifically, there was an invoice dated 11 January 2023, the very next day after the 10 January 2023 meeting issued by Harry Goldsmiths to the defendants for the sale of five kilograms of gold 916 at RM247 per gram for a total purchase consideration of RM1,235,000. There was no evidence that the plaintiffs were associated in any way with Harry Goldsmith at all. On the contrary, Harry Goldsmith was owned by Dato' Suhairi. (paras 30-33)

(1b) Although the defendants had created a WhatsApp group which had included the plaintiffs as a member, there was nothing to indicate that the plaintiffs were a contracting party to the gold SPA at all. It was the defendants who had included the plaintiffs to the WhatsApp group and it was also the defendants who had also subsequently removed the plaintiffs from the group on 7 February 2023. Similarly, it was the defendants who had changed the name of the group from 'Gold Supplier' to 'Supplier Wana Gold' and subsequently to 'Qalam Supplier Emas'. The contents of the WhatsApp conversations in fact clearly demonstrated that the defendants were dealing with Rashdan only for the delivery of the gold under the gold SPA and never with the plaintiffs. (para 34)

(1c) Furthermore, all the delivery orders were issued by Zuhal Distributor and not the plaintiffs. In fact, throughout the period from 20 January 2023 to 11 February 2023, the defendants were communicating only with Rashdan on the delivery of the balance gold purchased. The defendants sought the refund of the balance purchase price from Rashdan. No such claims were made to the plaintiffs by the defendants at all. Dato' Rozi, in his police report, also did not state that the plaintiffs were parties to the contract of sale at all. Both the documentary evidence and the conduct of the defendants confirmed the finding that the plaintiffs were never parties to the gold SPA which was plainly a contract between the defendants and Zuhal Distributor only. (paras 35-39)

(2) The defendants were informed at the 16 January 2023 meeting that the 382.70 grams of gold belonged to the plaintiffs and that the same were merely advanced to the defendants for the purpose of the defendants' opening of the Qalam Gold business. The defendants were aware at all times that they were obliged to return the 382.70 grams of gold to the plaintiffs and the same were not to be treated as part of the gold to be delivered pursuant to the gold SPA with Zuhal Distributor. Zuhal Distributor had issued only two delivery orders in respect of the gold that were delivered from Zuhal Distributor to the defendants. There was no delivery order from Zuhal Distributor for the 382.70 grams of gold that belonged to the plaintiffs. The fact that there was no delivery order issued by the plaintiffs in respect of the 382.70 grams of gold also indicated that the same were not intended as a sale to the defendants. The defendants failed to procure Raja, who was present at the 16 January 2023 meeting to testify. An adverse inference under s. 114(g) of the Evidence Act 1950 could be drawn as no satisfactory reasons were proffered for his absence. DW2, who was present at the meeting, expressly confirmed that the plaintiffs did indeed inform the

defendants that the 382.70 grams of gold belonged to them and were merely an advance to Qalam Gold. The defendants, by their failure to return the 382.70 grams of gold to the plaintiffs, had wrongly converted the same at the expense of the plaintiffs. (paras 48-50)

(3) At all times, the defendants' contract for the purchase of five kilograms of gold was with Zuhal Distributor only. Furthermore, Dato' Rozi testified that at the 16 February 2023 meeting, he was told for the first time that the plaintiffs had advanced the 382.70 grams of gold and the plaintiff had demanded the defendants for the return of the same. It was simply illogical and in fact incredulous to believe that the plaintiffs would voluntarily offer to the defendants to enter into Wana Gold premises and to take away the 224.70 grams of gold when the plaintiff had no contract with the defendants and when the defendants had not even returned the 382.70 grams of gold yet. The presence of the eight to nine men with the attendance of DW3, the police sergeant who was on duty from the police station located nearby, was a deliberate and intended act on the part of Dato' Rozi to intimidate and put fear into Fathin and Amirul so that they would submit to the will of the defendants. The 224.7 grams of gold taken from Wana Gold premises on 24 February 2023 was clearly wrongful and amounted to a conversion of the same by the defendants resulting in loss to the plaintiffs. (paras 53-60)

(4) The defendants had clearly exploited and manipulated a member of the police force to achieve their end of intimidating the plaintiffs into submission to their will. Fathin, Amirul and Rashdan had been detained at the wedding hall for a few hours and subjected to various threats to their well beings, leaving the plaintiffs with very little choice but to allow them to enter into the Wana Gold premises. Instead of pursuing their remedy against Zuhal Distributor and Dato' Suhairi even though Rashdan had provided them with Dato' Suhairi's residential address, the defendants opted to force the plaintiffs to open their safe at the Wana Gold premises and helped themselves to all the gold kept therein towards the satisfaction of their losses under the gold SPA. The defendants deployed a group of men to threaten the plaintiffs and secured the attendance of DW3 to add 'legitimacy' into their illegal acts. Such high-handed conduct could not be condoned. Exemplary damages ought to be made so that public confidence in the legal system is maintained and upheld. A sum of RM250,000 as exemplary damages ought to be imposed against the defendants to deter them and others from such conduct. (paras 66-74)

Case(s) referred to:

Ketua Polis Negara & Ors v. Nurasmira Maulat Jaffar & Ors And Other Appeals [2018] 1 CLJ 585 FC ***(refd)***

Khaw Cheng Poon & Ors v. Khaw Cheng Bok & Ors & Another Appeal [2005] 3 CLJ 753 CA ***(refd)***

Mohamed Kasdi v. PP [1968] CLJU 78; [1968] 1 LNS 78 HC ***(refd)***

Rookes v. Barnard [1964] AC 1129 ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 114(g)

For the plaintiffs - Mohd Amierul Sharafi Shaharizan & Nur Ralizah Rosli; M/s Law Chambers of Vin Sa & Ian

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JUDGMENT

Ong Chee Kwan J:

Introduction

[1] This judgment deals with a tragic but all too human tale where a party, having suffered a genuine wrong, chose to vent their grievance not against the true perpetrator, but against an innocent party caught in the crossfire. The facts reveal a misdirection of blame, motivated perhaps by convenience or perhaps by frustration or perhaps by a misapprehension of the law. This has resulted in unwarranted harm to one who bore no responsibility for the original wrong.

[2] The court is thus called upon not only to untangle the legal claims brought before it but also to reaffirm a fundamental principle of justice, namely, that liability must be grounded in fault or responsibility, not emotion or misplaced retribution or self-help. Where wrong has been done, redress must follow but it must be sought from the right quarter and in accordance with the law.

Background

[3] The second plaintiff, Fathin Syazwani bt Mohamad Zakri ("Fathin") is the sole proprietor of the first plaintiff ("Wana Gold"), trading in gold jewelleries and accessories at a shop unit at B2-21-3, Space U8 Mall, Persiaran Pasak Bumi, Bukit Jelutong, Shah Alam, Selangor ("Wana Gold premises").

[4] The third defendant, Dato' Mohd Rozi bin Ibrahim (DW 4) ("Dato' Rozi") is the sole proprietor of the second defendant, Qalam Gold Jewellery ("Qalam Gold"). The first defendant, Qalam Gold Jewellery (M) Sdn Bhd ("Qalam Gold SB") is a company wholly owned by Dato' Rozi.

[5] Sometime in early January 2023, the defendants had intended to purchase a large amount of gold for the opening of their gold shop. Towards this end, a meeting was held sometime on 10 January 2023 where Fathin (PW1) and her husband, Muhammad Amirul Syafiq bin Mohammad Tajudin (PW2) ("Amirul") both representing Wana Gold attended together with one Safiah bt Khalid (DW1), Raja Mohd Norak bin Raja Kadir ("Raja") and Dato' Rozi representing the defendants. They were later joined by Ahmad Rashdan bin Ahmad Kamal (PW3) ("Rashdan") who represented one Zuhal Distributor Enterprise ("Zuhal Distributor") and Harry Goldsmith ("the 10 January 2023 meeting"). It is not disputed that Zuhal Distributor and Harry Goldsmith were owned by one Dato' Suhairi bin Nordin ("Dato' Suhairi").

[6] Arising from the 10 January 2023 meeting, an agreement was reached between the defendants and Zuhal Distributor, where the defendants agreed to purchase five kilograms of gold at the price of RM1,235,000 ("the gold SPA").

[7] There is however a dispute as to whether the plaintiffs were involved in the gold SPA. The plaintiffs contended that they had merely introduced Rashdan of Zuhal Distributor to the defendants as the defendants were not prepared to purchase the five kilograms of gold from the plaintiffs at the prevailing market price. The defendants however contended that the plaintiffs were parties to the gold SPA and accordingly obliged to perform the same together with Zuhal Distributor.

[8] Pursuant to the gold SPA, it is not disputed that by 15 January 2023, the defendants had duly transferred to Zuhal Distributor the entire sum of RM1,235,000.

[9] On 16 January 2023 or 19 January 2023 (the actual date is unclear), Rashdan, Fathin and Amirul had attended Dato' Rozi's office and handed over about 2,513.58 grams of gold to the defendants. According to the plaintiffs, out of the 2,513.58 grams, 382.70 grams were in fact gold belonging to the plaintiffs ("the 382.70 grams of gold"). The plaintiffs claimed that Rashdan had approached them sometime on 16 January 2023 to advance to the defendants the 382.70 grams of gold because Zuhal Distributor was unable to make delivery of sufficient quantity of gold under the gold SPA at the time. The plaintiffs were informed that the defendants needed sufficient quantity of gold to be delivered for the opening of Qalam Gold business. It would be embarrassing if there were insufficient gold jewellery on display at the opening. With the intention to assist, the plaintiffs agreed to advance the 382.70 grams of gold and according to the plaintiffs, both Fathin and Amirul had attended personally at Dato' Rozi's office for the delivery on 16 January 2023 to inform the defendants of the arrangement.

[10] At this juncture, it must be noted that based on the WhatsApp exchanges, the first gold delivery from Rashdan to the defendants had occurred on 19 January 2023 and not 16 January 2023. Whilst the witnesses have testified that the delivery took place on 16 January 2023, the testimonies appeared inconsistent with the WhatsApp messages and the delivery orders DO-1901/2023 and DO-1902/2023 issued by Zuhal Distributor. Fortunately, whether the said meeting had taken place on 16 January 2023 or 19 January 2023 is immaterial to the case. It suffices that such a meeting had occurred and the delivery of the 2,513.58 grams of gold to the defendants took place. For convenience, I shall refer to the meeting as "the 16 January 2023 meeting".

[11] Returning to the events at the 16 January 2023 meeting, the defendants claimed that they had no knowledge that the 382.07 grams of gold was only an advance by the plaintiffs since the defendants were not privy to the conversation and or agreement between the plaintiffs and Rashdan. To the defendants, the defendants had fully paid the RM1,235,000 and the 2,513.58 grams of gold that was given to the defendants at the 16 January 2023 meeting constituted part of the five kilograms of gold to be delivered pursuant to the gold SPA.

[12] Between the 16 January 2023 meeting to 16 February 2023, only a total of about 3.5 kilograms of gold were delivered to the defendants from Zuhal Distributor notwithstanding repeated promises made by Rashdan and Dato' Suhairi that the entire five kilograms of gold would be delivered.

[13] On 16 February 2023, a meeting was held at Wana Gold premises between Dato' Suhairi and Rashdan representing Zuhal Distributor and Dato' Rozi representing the defendants ("the 16 February 2023 meeting"). At that meeting, a further 1,067.38 grams of gold were delivered and Zuhal Distributor had agreed to refund to the defendants a sum of RM444,906 representing the value of 1,801.24 grams of gold comprising the balance 1,419.67 grams due from Zuhal Distributor to the defendants under the gold SPA and the 382.70 grams of gold belonging to Wana Gold ("the refund sum").

[14] Unfortunately, no refunds were made by Zuhal Distributor after the 16 February 2023 meeting.

[15] On 24 February 2024, the defendants had organised a group of people to go to Rashdan's office at Kota Damansara to demand the refund sum. Notwithstanding that Rashdan had furnished them with Dato' Suhairi's residential address, they refused to go to Dato' Suhairi and instead insisted on fetching Rashdan to Wana Gold premises.

[16] Upon arrival at Wana Gold premises, the defendants found the shop closed and demanded Rashdan to contact Amirul. Both Amirul and Fathin then met up with the defendants at a wedding hall in Space U8 Mall ("the wedding hall meeting").

[17] There are disputes as to whether Fathin, Amirul and Rashdan were threatened at the wedding hall meeting. Rashdan claimed that he was physically assaulted at that time. Fathin and Amirul claimed that their well beings were threatened. This was denied by the defendants.

[18] What was unchallenged is the fact that Amirul had to return home to bring the keys to Wana Gold premises to unlock the same so that the defendants, together with a group of eight to nine men could enter. Significantly, Dato' Rozi had also brought along with him a police sergeant to come along to the Wana Gold premises.

[19] Both Fathin and Amirul testified that they were threatened with harm by the defendants to hand over their gold in the Wana Gold premises towards the satisfaction of the balance undelivered gold under the gold SPA. More specifically, they were put in fear for their safety with threats like "Sayang Nyawa atau Sayang Emas" (*ie*, 'love life or love gold') and the threat of cutting Amirul's manhood. At that time, Fathin was already a few months into her pregnancy.

[20] Video recordings of the event on 24 February 2023 at Wana Gold premises were produced and played in court at the trial. The recordings showed Fathin and Amirul allowing a group of men entering into the premises and Fathin opening of a safe kept in a room within the premises. The gold that were kept in the safe were taken out, weighed and subsequently some 224.70 grams of gold were taken away by the defendants ("the 224.70 grams of gold").

[21] The defendants denied that they had threatened anyone on 24 February 2023. Dato' Rozi testified that Fathin and Amirul had voluntarily permitted the defendants to enter the Wana Gold premises because the plaintiffs felt obliged to deliver the balance of gold that were undelivered under the gold SPA.

Plaintiffs' Claims

[22] Based on the aforesaid background facts, the plaintiffs in this action claimed against the defendants for:

(i) the return of the 382.70 grams of gold and the 224.70 grams of gold or their equivalent value in Ringgit Malaysia;

(ii) general, aggravated and exemplary damages; and

(iii) interest and costs.

Defendants' Defence

[23] In their defence, the defendants contended that the plaintiffs were in a joint venture and/or in partnership with Zuhal Distributor, and therefore the plaintiffs were obliged to ensure the performance of the gold SPA.

[24] The defendants denied that they were informed and/or were aware that the 382.70 grams of gold were only an advance by the plaintiffs that had to be returned. Instead, the defendants had treated the same as part of the gold that were to be delivered under the gold SPA. In fact, the defendants contended that the plaintiffs would not have handed over to the defendants the 382.70 grams of gold if the plaintiffs were not involved contractually in the gold SPA.

[25] The defendants further contended that the 382.70 grams of gold and the 224.70 grams of gold were handed over by the plaintiffs to the defendants because the plaintiffs were obliged to do so as a partner of Zuhal Distributor in respect of the gold SPA.

[26] As regards to the incident on 24 February 2023, the defendants claimed that the plaintiffs had on their own initiative invited the defendants into the Wana Gold premises as they felt responsible about the balance undelivered gold under the gold SPA.

[27] The defendants denied any trespass and/or that threats were made to instil fear into Fathin and Amirul in order to go into the Wana Gold premises. The defendants further denied that the 224.70 grams of gold were forcefully taken from the plaintiffs.

Issues For Determination

[28] Based on the aforesaid, this court will deliberate on the following issues:

(i) whether there was a contractual relationship between the plaintiffs and the defendants in respect of the gold SPA;

(ii) whether the 382.70 grams of gold belonging to the plaintiffs that were delivered to the defendants at the 16 January 2023 meeting formed part of the gold purchased by the defendants from Zuhal Distributor? Connected to this issue is whether the defendants were informed that the 382.70 grams of gold actually belonged to the plaintiffs and had to be returned to the plaintiffs;

(iii) whether the defendants had wrongfully converted the 224.70 grams of gold from the plaintiffs on 24 February 2023; and

(iv) whether the plaintiff is entitled to any general damages and or aggravated and exemplary damages.

[29] Each of the above issues will now be considered in turn.

The Plaintiffs' Roles, If Any, In The Gold SPA

[30] Based on Fathin's testimony, at the 10 January 2023 meeting, the defendants had agreed to purchase five kilograms of gold from Rashdan who was acting as the agent of Zuhal Distributor.

[31] According to Fathin, the defendants were not keen to purchase the gold from the plaintiffs as the plaintiffs were not able to sell the gold below the then prevailing market price.

[32] In this regard, Fathin's testimony is corroborated by documentary evidence which simply do not show the plaintiffs' involvement at all in the gold SPA. More specifically, there is an invoice dated 11 January 2023, the very next day after the 10 January 2023 meeting issued by Harry Goldsmiths to the defendants for the sale of five kilograms of gold 916 at RM247 per gram for a total purchase consideration of RM1,235,000. There is no evidence that the plaintiffs were associated in any way with Harry Goldsmith at all. On the contrary, Harry Goldsmith is owned by Dato' Suhairi.

[33] The aforesaid was followed in the next few days with the defendants making online transfers of monies totalling the sum of RM1,235,000 by 15 January 2023 into an agreed designated account belonging to Zuhal Distributor. Both Harry Goldsmith and Zuhal Distributor are owned by Dato' Suhairi.

[34] Although the defendants had created a WhatsApp group which had included the plaintiffs as a member, to my mind, there is nothing to indicate that the plaintiffs were a contracting party to the gold SPA at all. It was the defendants who had included the plaintiffs to the WhatsApp group, and it was also the defendants who had also subsequently removed the plaintiffs from the group on 7 February 2023. Similarly, it was the defendants who had changed the name of the group from "Gold Supplier" to "supplier Wana Gold" and subsequently to "Qalam Supplier Emas". The contents of the WhatsApp conversations in fact clearly demonstrate that the defendants were dealing with Rashdan only for the delivery of the gold under the gold SPA and never with the plaintiffs.

[35] Furthermore, all the delivery orders, namely the DO-1901/2023, DO-1902/2023 for 958.63 grams and 1,172.25 grams dated 19 January 2023 respectively, and the DO-1602-2023 for 1067.77 grams 1,067.77 grams dated 16 February 2023 were issued by Zuhal Distributor and not the plaintiffs. Similarly, the invoices nos IV-C1901/2023, IV-C1902/2023 and IV-C1602/2023 for the sums of RM236,781.61, RM289,545.75 and RM263,739.19 respectively for the aforesaid respective delivery orders were also issued by Zuhal Distributor and not the plaintiffs.

[36] In fact, throughout the period from 20 January 2023 to 11 February 2023, the defendants were communicating only with Rashdan on the delivery of the balance gold purchased. By 11 February 2023, only 2,511.77 grams of gold had been delivered leaving a balance of 2,488.23 grams which were equivalent to RM614,726.19. By this time, the defendants were already seeking the refund of the balance purchase price from Rashdan. No such claims were made to the plaintiffs by the defendants at all.

[37] In this regard, Rashdan had represented to the defendants that Zuhal Distributor and/or Harry Goldsmiths belonged to Dato' Suhairi who was his uncle and quite clearly from the WhatsApp exchanges, the defendants were looking only to Rashdan and or his uncle for the refund:

> 13/2/2023, 11:58 am - Cheezysefy (DW1): Salam Rashdan.
>
> Hope u can refund today ... we will not accept any excuse or explanation ... U already hold our money almost 1 month ... please do action before we take action ... Tq for being cooperated with us ...
>
> 14/2/2023, 8:06 am - Cheezysefy : Salam rashdan ... hri nie hrap u or ur uncle jumpa dato regarding brg kemas dato ... Today is a final decision to take action ... Hope ur uncle bh kerjasama ... Kami perlukan duit refund today or bgi brg kemas asap ... kalua tak dato will take action do report police.

[38] Indeed, Dato' Rozi in his police report lodged on 6 March 2023 had confirmed the account given by Fathin at the 10 January 2023 meeting, wherein Dato' Rozi stated that he was introduced to Rashdan by the plaintiffs, and that Rashdan had represented that his uncle, Dato' Suhairi, owned a gold factory in Pulau Pinang and that arising from the meeting the defendants had agreed to purchase five kilograms of gold from Rashdan's uncle. The defendants did not state in the police report that the plaintiffs were parties to the contract of sale at all.

[39] In the premises, both the documentary evidence and the conduct of the defendants above confirmed the finding of this court that the plaintiffs were never parties to the gold SPA which was plainly a contract between the defendants and Zuhal Distributor only.

[40] It was only after Rashdan and/or Zuhal Distributor had failed to deliver the balance of the gold purchased and or to refund the purchase price for the balance of undelivered gold that the defendants started to implicate the plaintiffs as parties to the contract of sale. It is my judgment that the aforesaid is wholly without any legal basis as the plaintiffs' only role was merely to introduce the defendants to Rashdan at the 10 January 2023 meeting.

Whether The Defendants Are Obliged To Return The 382.70 Grams Of Gold

[41] There is no dispute that on the 16 January 2023 meeting, Rashdan, Fathin and Amirul had attended at Qalam Gold premises. According to them, at that meeting with Dato' Rodzi and his manager, one Encik Raja, it was expressly informed to them, particularly, Encik Raja that of the 2,511.77 grams of gold that were delivered, the 382.70 grams of gold in fact belonged to the plaintiff.

[42] However, Dato' Rodzi denied that he was informed at the meeting that the 382.70 grams of gold belonged to the plaintiff. According to him, the 382.70 grams of gold were delivered to him together with the other quantity of gold by Rashdan as part of the five kilogram of gold that he had purchased from Zuhal Enterprise. Dato' Rozi's contention is that the arrangement between the plaintiff and Rashdan regarding the 382.70 grams of gold, if at all, was a matter strictly between them. In other words, the defendants had treated the entire 2,511.77 grams of gold as supplied and delivered by Zuhal Distributor pursuant to the gold SPA.

[43] However, Dato' Rodzi did not procure Encik Raja to corroborate his testimony at all. No reason was proffered for Encik Raja's absence save that according to learned counsel for the defendants, the burden of establishing firstly, that the defendants were informed and knew that the 382.70 grams of gold belonged to the plaintiffs and secondly, that the same were to be returned to the plaintiffs, rests with the plaintiffs. Reliance on the aforesaid, learned counsel for the defendants contended that there was no necessity for them to call Encik Raja to testify.

[44] Whilst it is true that the legal burden of proof lies with the plaintiffs, nevertheless, the evidential burden shifts to the defendants when Rashdan, Fathin and Amirul all testified that the defendants were informed of the said fact at the 16 January 2023 meeting. More specifically:

(i) Fathin had testified that Rashdan had on 16 January 2023 met up with her and Amirul to seek for their help to 'advance' the 382.70 grams of gold to the defendants;

(ii) Rashdan had assured her that the defendants would return the gold to her;

(iii) the defendants needed sufficient quantity of gold in order to launch the opening of Qalam Gold business. She had agreed to advance the 382.70 grams of gold in order to assist the defendants for its opening;

(iv) the defendants knew that the 382.70 grams of gold are not to be treated as part of the gold delivered by Zuhal Distributor and needed to be returned to the plaintiffs; and

(v) photographs were taken of the 382.70 grams of gold as evidence of the plaintiffs advancing the same.

[45] Fathin's testimony was corroborated by Amirul and Rashdan. More specifically, Amirul testified that he would not have asked the defendants for the return of the 382.70 grams of gold if it was never informed to the defendants at the 16 January 2023 meeting that the same were merely advanced to them to assist in the defendants' opening of its gold business.

[46] Rashdan in turn testified that:

(i) the 382.70 grams of gold from the plaintiffs were advanced to support the defendants' intention to launch the opening of their business;

(ii) Encik Raja was specifically informed about the plaintiffs' gold and that the same were to be returned;

(iii) the arrangement was further evidenced by the fact that the gold from Zuhal Distributor and that from the plaintiff were separately packed and photographed; and

(iv) that sometime on 10 February 2023, a proposal was made by Zuhal Distributor to the defendants to resolve the issue relating to the balance gold which were not supplied to the defendants. In the proposal for the refund, there was a clear recognition that the 382.70 grams of gold belonged to the plaintiffs.

[47] The aforesaid shifted the evidential burden to the defendants to show that at the 16 January 2023 meeting, they were not informed of the plaintiffs' advance. In this connection, it is significant that Encik Raja did not attend to testify on the event. Dato' Radzi who attended the meeting testified denying that the defendants were informed about the plaintiff merely advancing the 382.70 grams of gold to the defendants. However, he did not come across as a credible witness, insisting on a narrative that would fit his claims even when the facts do not otherwise support the same. The following illustrates my point:

(i) he insisted that at the 10 January 2023 meeting, Fathin, Amirul and Rashdan had all represented that they were agents of Zuhal Distributor even though in his own answer to Q/A 6 of his evidence in chief and in his statement made to the police in his police report dated 6 March 2023, a contrary version was given. In *Mohamed Kasdi v. PP* [1968] CLJU 78; [1968] 1 LNS 78; [1969] 1 MLJ 135, the court held:

> No hard and fast rule can be laid down for determining the credibility of a witness, but **when a witness gives or makes two statements which differ in material particulars there must be necessarily ground for believing that he is not a truthful witness**.
>
> (emphasis added)

(ii) he denied that the plaintiffs and Rashdan had each given their respective different quotes to him at the 10 January 2023 meeting and that he had agreed to purchase the five kilograms of gold from Rashdan because his offer price was lower than that offered by the plaintiffs. This was inconsistent with the testimony of his personal assistant, DW1, who was present at the meeting;

(iii) he insisted that he had made payment to the plaintiffs when in fact all payments were made directly to Zuhal Distributor;

(iv) he maintained that the plaintiffs were involved in matters relating to the delivery of the gold from Zuhal Distributor even when there was absolutely no evidence in support of this contention. On the contrary, the WhatsApp communication that was disclosed to the court shows that at all times, the defendants were dealing only with Rashdan on the delivery of the gold. In fact, from the evidence disclosed, the only time the plaintiffs were involved during delivery of the gold was at the 16 January 2023 meeting when the plaintiffs had advanced the 382.70 grams of gold;

(v) he further disagreed that the plaintiffs were not involved in the proposal by Zuhal Distributor to refund the defendants on 10 February 2023, even though the evidence clearly demonstrates otherwise and that the defendants had looked only to Zuhal Distributor for the refund; and

(vi) his testimony that the plaintiffs had, on her own initiative, invited the defendants and their group of friends to enter her business premises on 24 February 2023 and that the plaintiffs had voluntarily surrendered the further 224.70 grams of gold to the defendants is simply incredible given that by his own evidence, the plaintiffs had at the 16 February 2023 meeting asked for the return of the 382.70 grams of gold. There is no logical reason why the plaintiffs would willingly give the defendants further gold when their demand for the 382.70 grams of gold had still not been satisfied. This aspect of the evidence will be elaborated further below.

[48] Accordingly, it is the finding of this court that the defendants were in fact informed at the 16 January 2023 meeting that the 382.70 grams of gold belonged to the plaintiffs and that the same were merely advanced to the defendants for the purpose of the defendants' opening of Qalam Gold business. The defendants were aware at all times that they were obliged to return the 382.70 grams of gold to the plaintiffs, and the same were not to be treated as part of the gold to be delivered pursuant the gold SPA with Zuhal Distributor.

[49] Quite apart from the fact that I have found Fathin, Amirul and Rashdan to be more credible as witnesses, my finding of fact is further supported by the following:

(i) notwithstanding that the plaintiffs were never a party to the gold SPA between Zuhal Distributor and the defendants, both Fathin and Amirul had personally attended at Qalam Gold premises on 19 January 2023 when the 382.70 grams of gold were delivered to the defendants;

(ii) Zuhal Distributor had issued only two delivery orders in respect of the gold that were delivered from Zuhal Distributor to the defendants at the 16 January 2023 meeting. The delivery order nos DO-1902/2023 and

DO-1901/2023 were for 1,172.25 grams and 958.63 grams of gold respectively. There was no delivery order from Zuhal Distributor for the 382.70 grams of gold that belonged to the plaintiffs. To my mind, from the aforesaid two delivery orders from Zuhal Distributor, the defendants would have known that the 382.70 grams of gold which were also handed to them on the same day, were not gold, belonging to Zuhal Distributor or supplied by them under the gold SPA at all. Further, the fact that there was no delivery order issued by the plaintiffs in respect of the 382.70 grams of gold also indicates that the same were not intended as a sale to the defendants;

(iii) the testimony that the 382.70 grams of gold were advanced to assist the defendants for the opening of Qalam Gold business was not challenged or contradicted with any evidence that there was no such opening at the material times. It also fits Rashdan's testimony that Zuhal Distributor had wanted to deliver at least half of the gold purchased to the defendants for their opening. Referring to the delivery orders, Rashdan testified as follows:

> Okay. 26 hingga 27, ini daripada Zuhal, dia serahkan barang kemas yang ditempah oleh pihak Qalam tapi barang kemas ini yang dihantar dekat saya ini tak cukup. Tak cukup yang diorder oleh pihak Qalam. Jadi, bila barang ini tak cukup, saya cuba bincang dengan pihak Wana gold dan pihak Wana gold, dia macam nak membantu pihak Qalam disebabkan pihak Qalam baru buka kedai emas. Jadi, tak adalah cukup, dis 2.5 macam itulah. So balance daripada pihak Zuhal kena beri balik kepada pihak Qalam ada lagi separuhlah, macam itu, Yang Arif.

(iv) the defendants had never maintained that the 382.70 grams of gold were part of the gold that Zuhal Distributor was obliged to deliver under the gold SPA, even after according to Dato' Rozi, he was made aware that the same in fact belonged to the plaintiff at the 16 February 2023 meeting;

(v) the defendants failed to procure Encik Raja who was present at the meeting at the 16 January 2023 meeting to testify. The court can draw an adverse inference under s. 114(g) of the Evidence Act 1950 as no satisfactory reasons were proffered for his absence; and

(vi) DW2, although he did not appear in the photographs as a party attending the 16 January 2023 meeting, nevertheless testified that he was present at the time, expressly confirmed that the plaintiffs did indeed inform the defendants that the 382.70 grams of gold belonged to them and were merely an advance to Qalam Gold. The relevant parts of DW2's testimony are reproduced below:

Amierul: Saya faham. Tetapi Encik Khairul, okay finelah. Encik Khairul tak ada dalam gambar. Tapi cuma saya nak tahu, seingat Encik Khairul lah, Encik Khairul ada tak masa perjumpaan di publika ini?

DW2: Saya ada masa perjumpaan di publika.

Amierul: So Encik Khairul kata, hari ini berlaku serahan emas. Kalau saya cadangkan serahan emas ini adalah sebahagiannya daripada Wana gold, dan sebahagiannya daripada Zuhal Distributor, Encik Khairul setuju?

DW2: Ya sebab Amirul yang hantar emas itu. Betullah dengan Tuan, tuan cakap.

Amierul: Setuju tak kalua saya cadangkan pada 16 Januari ini, pihak Wana gold dah maklumkan kepada pihak Qalam bahawa mereka dahulukan emas mereka kepada Qalam. Seingat Encik Khairul lah, Encik Khairul boleh cakap tak ingat ke, ta setuju ke, apa? Ini cadangan saya ani.

DW2: Kalau ikut Tuan, Tuan cakap macam itu, setujulah. Wana gold yang bagi.

[50] In the premises, it is the judgment of this court that the defendants by their failure to return the 382.70 grams of gold to the plaintiffs, have wrongly converted the same at the expense of the plaintiffs.

Whether The Plaintiffs Willingly Surrendered The 224.70 Grams Of Gold

[51] There is no dispute that the defendants had taken the 224.7 grams of gold belonging to the plaintiffs that were kept in the safe at the Wana Gold premises located at level 3 of the Space U8 Mall on 24 February 2023.

[52] According to the defendants, the plaintiff had voluntarily invited the defendants to Wana Gold premises to take delivery of the balance of the undelivered gold that the defendants had purchased from Zuhal Distributor. In this regard, Dato' Rozi testified that although the balance of undelivered gold from Zuhal Distributor at the time were around 1,420 grams, only the 224.70 grams of gold were voluntarily delivered by the plaintiffs to the defendants. Accordingly, the defendants claimed that there was no wrongful conversion of the 224.70 grams of gold by him at all since the plaintiffs were always obliged under the gold SPA to deliver the same.

[53] With respect, the defendants' contentions are not supported by my findings of the facts of this case. Contrary to the contention of the defendants, I have found that the defendants had no contractual relationship with the plaintiffs at all. At all times, the defendants' contract for the purchase of five kilograms of gold was with Zuhal Distributor only. There was never any obligation on the part of the plaintiffs to deliver any gold at all to the defendants under the gold SPA.

[54] The aforesaid put paid to Dato' Rozi's testimony that the plaintiffs had voluntarily invited the defendants to Wana Gold premises on 24 February 2023 for the purpose of delivering the balance golds under the gold SPA with Zuhal Distributor.

[55] Furthermore, Dato' Rozi had testified that at the 16 February 2023 meeting, he was told for the first time that the plaintiffs had advanced the 382.70 grams of gold, and the plaintiff had demanded the defendants for the return of the same. This being the case, it is simply illogical and in fact incredulous to believe that the plaintiffs would voluntarily offer to the defendants to enter into Wana Gold premises and to take away the 224.70 grams of gold, when the plaintiff had no contract with the defendants and when the defendants had not even returned the 382.70 grams of gold yet.

[56] In fact, as rightly pointed by learned counsel for the plaintiffs, if indeed, the plaintiffs had willingly allowed the defendants to enter the Wana Gold premises and to permit full access to the safe in the business premises so that the defendants could help themselves to the 224.70 grams of gold, there would be no reason for the plaintiffs to lodge police reports against the defendants claiming that the defendants had intruded into the premises under threats and duress.

[57] The defendants also did not challenge both Fathin's and Amirul's testimonies that the 24 February 2023 meeting was initiated by the defendants and that Amirul did not even have the keys to the Wana Gold premises with him at the time and had to return to his house to retrieve the same.

[58] Finally, if the plaintiffs had willingly invited the defendants to Wana Gold premises to take delivery of the balance gold as claimed, there would be absolutely no reasons for the defendants to have brought along with them the eight to nine more men together with DW3, the police sergeant who was on duty from the police station located at Space U8 Mall purportedly as 'witness'.

[59] To my mind, the presence of the eight to nine men with the attendance of DW3 was a deliberate and intended act on the part of Dato' Rozi to intimidate and put fear into Fathin and Amirul so that they would submit to the will of the defendants.

[60] For the reasons above, it is the judgment of this court that the 224.7 grams of gold taken from Wana Gold premises on 24 February 2023 was clearly wrongful and amounted to a conversion of the same by the defendants resulting in loss to the plaintiffs.

Exemplary Damages

[61] In the present case, the plaintiffs have asked for exemplary damages to be ordered against the defendants.

[62] Our Court of Appeal in *Khaw Cheng Poon & Ors v. Khaw Cheng Bok & Ors & Another Appeal* [2005] 3 CLJ 753; [2005] 5 AMR 185 had adopted the principles set out in *Rookes v. Barnard* [1964] AC 1129 in respect of the circumstances where exemplary damages may be awarded which are:

(i) where the plaintiff has been a victim of oppressive, arbitrary or unconstitutional acts of servants of the Government;

(ii) where the defendant's act in disregarding the plaintiff's, right has been calculated by him to bring in profit which exceeds the compensation payable to the plaintiff; or

(iii) where exemplary damages are specifically authorised by statutes.

[63] More specifically at para. [26] of the judgment, the Court of Appeal held:

> [26] ... Exemplary damages are only awarded in very special circumstances. These circumstances are contained in the speech of Lord Delvin in *Rookes v. Barnes* [1964] AC 1129. That no new categories are admissible to the Devlin list has now been settled in the decision on the House of Lords in *Cassle & Co Ltd v. Broome*.

[64] However, our Federal Court in *Ketua Polis Negara & Ors v. Nurasmira Maulat Jaffar & Ors And Other Appeals* [2018] 1 CLJ 585; [2018] 3 MLJ 184 has adopted a wider test for exemplary damages. At para. [42] of the said judgment, the Federal Court held:

> [42] ... The English courts have moved on from *Rookes v. Barnes* and have adopted a wider test, criticizing the need to be limited or restrained to the three categories of that case (*Kuddus v. Chief Constable of Leicestershire Constabulary* [2001] 3 All ER 193; [2001] 1 UKHL 29).
>
> The House of Lords in *Kuddus v. Chief Constable of Leicestershire* on widening the scope for award:
>
> > On occasion conscious wrongdoing by a defendant is so outrageous, his disregard of the [claimant's] rights so contumelious, that something more is needed to show that the law will not tolerate such behavior. Without an award of exemplary damages, justice will not have been done.

[65] It is my judgment that the present case is indeed such a case where exemplary damages must be awarded in an order that justice is served.

[66] As a start, the defendants had clearly exploited and manipulated a member of the police force to achieve their end of intimidating the plaintiffs into submission to their will. In this regard, Dato' Rozi had intentionally misrepresented to the police sergeant, DW3, who was on duty at the time,

that the plaintiffs were contractually obliged to deliver the gold under the gold SPA to the defendants. Notwithstanding that no police report was filed by the defendants at the time and therefore no investigations had been made, Dato' Rozi had persuaded DW3 to go with him to Wana Gold premises purportedly to 'witness' the delivery of the balance undelivered gold under the gold SPA from the plaintiffs to the defendants.

[67] Unbeknown to DW3, prior to coming up to the Wana Gold premises, Fathin, Amirul and Rashdan had already been 'detained' at the wedding hall at Space U8 Mall for a few hours and subjected to various threats to their well beings. In this regard, I am more inclined to accept the plaintiffs' testimonies that threats were indeed made to their life by the defendants who had with them a gang of eight to nine men with him. There was absolutely no reason to bring along so many people as neither Fathin and Amirul had come across as aggressive and or violent persons. In fact, no evidence was adduced to suggest otherwise.

[68] The aforesaid, coupled with the sight of a police sergeant coming together with Dato' Rozi with the gang of eight to nine men who had tattoos and had behaved rowdily and had threatened Fathin's and Amirul's life, to my mind, left the plaintiffs with very little choice but to allow them to enter the Wana Gold premises.

[69] Quite clearly, even if the defendants had a legal basis (which they had not) to contend that the plaintiffs were obliged to deliver the balance gold under the gold SPA, there was no justifiable reasons for the defendants to exercise self-help by entering into the plaintiff's premises to take the plaintiffs' gold kept in the safe room.

[70] It was indeed unfortunate that DW3, as a police sergeant, had unwittingly allowed himself to be exploited by Dato' Rozi but his presence did not at all give the defendants the legal right to put fear into the plaintiffs to permit the defendants and his men to enter into Wana Gold premises and to take away the 224.70 grams of gold. The role of the police is to maintain peace and not to enforce private contracts and or to authorise entry into private property without a warrant or a court order.

[71] If the defendants believe that the plaintiffs owed legal obligations to them under the gold SPA, the proper course was for the defendants to commence legal actions in courts which exist to resolve civil disputes fairly based on evidence and legal principles. No party can be permitted to exercise self-help (save in exceptional circumstances) and to ignore the legal processes and seek to enforce contracts on their own terms. Self-help often involves trespass, intimidation or invasion of property and potentially gives rise to physical confrontations when parties decide 'to take matters into their own hands'.

[72] If people see that those who enforce contracts through unlawful means can succeed or be permitted, this will inevitably undermine the moral and legal obligation to resolve disputes through the proper channels, sending a message that might is right or that breaking the law is an effective remedy.

[73] In this case, this was exactly what the defendants had set out to do. Instead of pursuing their remedy against Zuhal Distributor and Dato' Suhairi even though Rashdan had provided them with Dato' Suhairi's residential address, the defendants opted to force the plaintiffs to open their safe at the Wana Gold premises and help themselves to all the gold kept therein towards satisfaction of their losses under the gold SPA. To this end, the defendants deployed a group of men to threaten the plaintiffs and secured the attendance of DW3 to add 'legitimacy' into their illegal acts. Such high-handed conduct cannot be condoned, and I agree that exemplary damages ought to be made so that public confidence in the legal system is maintained and upheld.

[74] For the reasons above, it is my judgment that in the circumstances of this case, a sum of RM250,000 as exemplary damages ought to be imposed against the defendants to deter them and others from such conduct.

Conclusion

[75] In the premises, it is hereby adjudged that:

(i) the defendants do within 14 days from the date of this judgment jointly and severally pay to the plaintiffs a sum equivalent to the prevailing market value of 382.70 grams and 224.70 grams of 916 gold;

(iii) the defendants do within 14 days from the date of this judgment jointly and severally pay the plaintiffs a sum of RM250,000 being exemplary damages; and

(iii) the defendants to pay interests at the rate of 5% per annum in respect of the sums ordered to be paid above from the date the said sums are payable until full realisation is made.

The defendants to pay the plaintiffs costs fixed at RM80,000 subject to allocator.